

The issue before the Board on this appeal is the nature and extent of claimant's disability. The ALJ found claimant was not entitled to a work disability award because "he

was terminated for cause unrelated to his injury."<sup>1</sup> As a result, claimant was awarded permanent partial disability compensation based upon his percentage of functional impairment, which the ALJ determined was ten percent to the body as a whole.

Claimant disputes that finding and argues he exercised good faith in performing his post-injury accommodated job with respondent and, after his termination, in attempting to find appropriate employment elsewhere. Claimant argues he is therefore entitled to a work disability based upon his actual wage loss of 100 percent averaged with his task loss which he contends is 45 percent. This would result in a work disability of 72.5 percent.

Respondent asks the Board affirm the ALJ's determination that claimant is precluded from receiving a work disability because he was terminated for cause from an accommodated job that claimant had the ability to perform. But the Board should find claimant's functional impairment to be five percent based upon the opinion of Dr. Philip Mills. In the alternative, should a work disability be awarded, respondent contends claimant's task loss is 9.7 percent and that a wage should be imputed to claimant due to his failure to make a good faith effort to find appropriate employment following his termination by respondent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the briefs and oral arguments of the parties, the Board makes the following findings and conclusions:

The ALJ's Award sets out the relevant facts in some detail. It is not necessary to repeat all of the facts in this Order. Highly summarized, claimant injured his back on June 12, 2000. Surgery was recommended but, because of claimant's religious beliefs he could not receive a blood transfusion. This increased the risk of surgery such that claimant determined the potential benefits did not outweigh the risks. Accordingly, claimant declined surgical treatment and returned to work with permanent restrictions.

As claimant's job duties were already being transitioned from laborer to working supervisor, claimant was able to assume more supervisory responsibilities and reduce the physical demands of his job such that he was able to continue working for respondent within his restrictions.

In accordance with respondent's progressive discipline policy claimant received written and verbal warnings in August 2001 for releasing improperly sized parts from the chrome plating department. Claimant again received a written warning in September 2001 and verbal warnings in December 2001 and January 2002. Two (2) more written warnings

---

<sup>1</sup> Award at 13 (June 2, 2003).

were issued in February 2002, before claimant received his final written warning on February 20, 2002. Claimant was terminated effective February 25, 2002.

The ALJ concluded that claimant had failed to perform the essential duties of his job for reasons unrelated to his injury. The Board agrees. Claimant disputes that his conduct was willful or malicious and further denies that he acted in bad faith. Conversely, claimant contends respondent's conduct and his termination was done in bad faith because it was in retaliation for his proceeding with a workers compensation claim. Furthermore, claimant argues that respondent failed to follow its own policy procedures when respondent terminated claimant.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.<sup>2</sup> In this case, claimant was terminated for violating respondent's policies. Although claimant disputes the factual basis for the termination, the Board finds the record fails to establish that the termination was made because of claimant's work-related injuries or in bad faith. In fact, the Board finds that the greater weight of the evidence supports a finding that claimant was negligent in performing his job duties and insubordinate as alleged. The Board concludes claimant's actions were a willful and knowing violation of the respondents rules and policies. As such, claimant's conduct was tantamount to a refusal to perform appropriate work as in *Foult*<sup>3</sup> or a failure to make a good faith effort to retain appropriate employment as described in *Copeland*.<sup>4</sup> Accordingly, because claimant was terminated for misconduct, the wage he was earning and would have continued to earn had he continued working for respondent should be imputed to him. As this was at least 90 percent of his average weekly wage, his permanent partial general disability award is based upon his permanent functional impairment.<sup>5</sup>

The claimant also argues that even if he was terminated for cause from an accommodated job that was within his restrictions, he remains entitled to a work disability because his termination was not in good faith. In *Niesz*<sup>6</sup> the Court found that where a claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work

---

<sup>2</sup> See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Oliver v. The Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

<sup>3</sup> *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>4</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>5</sup> See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied 267 Kan. 889 (1999).

<sup>6</sup> *Niez v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

disability. In this case, however, respondent conducted an adequate investigation of the facts. In addition, the evidence shows that respondent did not act arbitrarily or in bad faith.

Claimant worked for respondent for several years as a laborer and later a lead man without receiving any disciplinary warnings or write-ups. In fact, he was described as an excellent worker and employee. It was not until after claimant became a supervisor that his problems started.

The evidence suggests that part of claimant's problems were the result of his inadequacy as a supervisor. Claimant's inability to communicate effectively in English probably contributed to his problems. Most of claimant's written warnings came after the Spanish speaking workers under his supervision were replaced by English speaking workers. Coincidentally, these written warnings also came after claimant's back injury. Claimant argues this is evidence of retaliation. Respondent counters that claimant's attitude changed after his Spanish speaking relatives were terminated. It may be however, that claimant's attitude changed because he was working in pain and also was frustrated about the difficulty he was having trying to train English speaking workers. Furthermore, mistakes made by those workers were coming back on him. It may be that claimant just was not well suited for the supervisor position. Unfortunately, a demotion back to a laborer position was not possible due to claimant's restrictions from his back injury. Thus, the employer did not have demotion as an disciplinary option.

If the mistakes were the only basis for terminating claimant, the Board might have concluded that neither party acted in bad faith and that a work disability award was not precluded. However, there was also the problem with insubordination. This was willful conduct by claimant and demonstrated a degree of bad faith on his part. It is this element of willfulness that causes the Board to conclude that claimant's conduct and resulting termination was tantamount to a refusal to perform work. There is no dispute that the work was within claimant's restrictions. And although claimant questions the fairness or reasonableness of his employer's expectations, he does not allege that he was unable to perform the work expected of him. Again, the Board does not find that the progressive discipline was a pretext for terminating claimant because of his workers' compensation claim, or that the respondent otherwise acted in bad faith.

Claimant was terminated for cause from an accommodated job which was within his restrictions. Accordingly, the post-injury wage claimant was earning with respondent before his termination will be imputed to him. As this wage was more than 90 percent of the average weekly wage claimant was earning at time of this accident, he is precluded from receiving a permanent partial disability award in excess of the percentage of functional impairment.

The Board agrees with the ALJ's determination that claimant's functional impairment is ten percent.

**AWARD**

**WHEREFORE**, the Award of Administrative Law Judge Bruce E. Moore dated June 2, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February 2004.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant  
Gary K. Albin, Attorney for Respondent and St. Paul Fire & Marine  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director